Filed 11/19/15 Gillespie v. Svale Del Grande, Inc. CA6
Opinion on remand

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

**California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

| | |
|---|---|
| SUZANNE GILLESPIE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>SVALE DEL GRANDE, INC., et al.,<br><br>Defendants and Appellants. | H039428<br>(Santa Clara County<br>Super. Ct. No. CV233338) |

## I. INTRODUCTION

This matter has been transferred to this court by the California Supreme Court with directions to vacate our decision and to reconsider the cause in light of *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899 (*Sanchez*). In our prior decision, we determined that an arbitration clause in the parties' vehicle sales contract contained a valid class action waiver, but that three other provisions in the arbitration clause were unconscionable. We reversed the trial court's order denying the petition to compel arbitration by defendant Svale Del Grande, Inc., doing business as Nissan Sunnyvale, and defendant Bank of the West, and we remanded the matter to the trial court for the limited purpose of determining whether to sever the three unconscionable provisions.

Following the direction of the California Supreme Court, we vacated our prior decision. Having reconsidered the matter in light of *Sanchez*, in which the California

Supreme Court determined that a similar arbitration clause was not unconscionable, we will, for the reasons stated below, reverse the trial court's order denying defendants' petition to compel arbitration.

## II. FACTUAL AND PROCEDURAL BACKGROUND

### A. *The Complaint*

In October 2012, plaintiff Suzanne Gillespie filed a putative class action complaint against defendants. According to the complaint, Gillespie entered into a Retail Installment Sale Contract with Nissan Sunnyvale for the purchase of a used 2007 Acura TL for $18,900. After mutually agreeing to rescind the contract four days later, Gillespie and the car dealership entered into a second Retail Installment Sale Contract for the same vehicle but with a lower loan rate. The car dealership allegedly backdated the second contract to the date of the first contract which resulted in "undisclosed and illegal finance charges." The car dealership also allegedly charged a statutory fee for new tires although the vehicle Gillespie purchased had used tires, charged an optional California Department of Motor Vehicles (DMV) electronic filing fee for registration without asking Gillespie if she wanted to pay it, and committed other "violations of law," including making misrepresentations about an extended warranty and failing to provide the required disclosures regarding her credit scores. After Gillespie purchased the vehicle, the sale contract was assigned to defendant Bank of the West.

Gillespie alleges 11 causes of action against the car dealership and the bank, including causes of action for violations of the Consumers Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.), the Automobile Sales Finance Act (Civ. Code, § 2981 et seq.), the unfair competition law (Bus. & Prof. Code, § 17200 et seq.), the Vehicle Code, and Public Resources Code section 42885. Gillespie also alleges some of the causes of action on behalf of the following classes: (1) individuals whose contract was backdated, (2) individuals who were charged a tire fee for used tires, and (3) individuals who were automatically charged an optional DMV electronic filing fee. Gillespie seeks declaratory

relief, injunctive relief, actual damages, statutory damages, punitive damages, rescission of the purchase contract, and restitution, among other relief.

**B. *The Petition to Compel Arbitration***

In November 2012, defendants filed a petition to compel arbitration. Defendants contended that both contracts signed by Gillespie contained an identical agreement to arbitrate, that Gillespie's dispute was subject to arbitration, and that the arbitration agreement was not unconscionable. Defendants also argued that Gillespie had waived her class claims pursuant to the arbitration agreement.

In support of the petition, defendants provided a declaration from Anthony Corini, the Nissan Sunnyvale finance and insurance manager involved in the transaction with Gillespie. Corini stated that it was his "custom and practice" in going over a sale contract with a customer to "emphasize each place the customer has to sign and point out the important terms," including "where the customer signs below where it" states that an arbitration clause is on the reverse side. Corini further stated that he did not recall Gillespie asking for more time to read either contract, and that if she had, he would have provided her with more time, based on his custom and practice. He also did not recall Gillespie asking any questions about the terms of the second contract.

**1. The Retail Installment Sale Contracts**

The two contracts that Gillespie signed are preprinted forms that contains blank spaces for, among other things, the make and model of the vehicle being purchased, the price of the vehicle, the amount financed, and the annual percentage rate. Gillespie appears to have signed her name in at least seven places on the front side of the forms. Near the bottom of the front side of the form, above and to the right of Gillespie's last signature, is the following statement: "YOU AGREE TO THE TERMS OF THIS CONTRACT. YOU CONFIRM THAT BEFORE YOU SIGNED THIS CONTRACT, WE GAVE IT TO YOU, AND YOU WERE FREE TO TAKE IT AND REVIEW IT. YOU ACKNOWLEDGE THAT YOU HAVE READ BOTH SIDES OF THIS

CONTRACT, INCLUDING THE ARBITRATION CLAUSE ON THE REVERSE SIDE, BEFORE SIGNING BELOW. YOU CONFIRM THAT YOU RECEIVED A COMPLETELY FILLED-IN COPY WHEN YOU SIGNED IT."

**2. The arbitration clause**

On the back of each contract, in a box near the bottom of the page, is the following:

"**ARBITRATION CLAUSE**

"**PLEASE REVIEW - IMPORTANT - AFFECTS YOUR LEGAL RIGHTS**

"1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.

"2. IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.

"3. DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT, AND OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.

"Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Clause, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. If federal law provides that a

claim or dispute is not subject to binding arbitration, this Arbitration Clause shall not apply to such claim or dispute. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. You may choose one of the following arbitration organizations and its applicable rules: the National Arbitration Forum . . . (www.arb-forum.com), the American Arbitration Association . . . (www.adr.org), or any other organization that you may choose subject to our approval. You may get a copy of the rules of these organizations by contacting the arbitration organization or visiting its website.

"Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law in making an award. . . . We will advance your filing, administration, service or case management fee and your arbitrator or hearing fee all up to a maximum of $2500, which may be reimbursed by decision of the arbitrator at the arbitrator's discretion. Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. If the chosen arbitration organization's rules conflict with this Arbitration Clause, then the provisions of this Arbitration Clause shall control. The arbitrator's award shall be final and binding on all parties, except that in the event the arbitrator's award for a party is $0 or against a party is in excess of $100,000, or includes an award of injunctive relief against a party, that party may request a new arbitration under the rules of the arbitration organization by a three-arbitrator panel. The appealing party requesting new arbitration shall be responsible for the filing fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs. Any arbitration under this Arbitration Clause shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et. seq.) and not by any state law concerning arbitration.

"You and we retain any rights to self-help remedies, such as repossession. You and we retain the right to seek remedies in small claims court for disputes or claims

within that court's jurisdiction . . . . If any part of this Arbitration Clause, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable. If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the remainder of this Arbitration Clause shall be unenforceable."

**C. *Opposition to the Petition to Compel Arbitration***

In opposition, Gillespie contended that the arbitration clause was unenforceable. She argued that the class action waiver was illegal under the CLRA and therefore the arbitration clause, by its own terms, was also unenforceable. She further argued that the arbitration clause was unconscionable.

Gillespie filed a supporting declaration and a declaration from counsel. In her own declaration, Gillespie stated that when she signed both contracts, she was presented with a "stack" of documents, told where to sign or initial, was not "given an opportunity to read all of the documents in full," and was not "given an opportunity to negotiate any of the pre-printed terms." According to Gillespie, the documents were presented on a "take-it-or-leave-it" basis and she thought only the pricing terms were negotiable. She had "no reason to suspect that hidden on the back of the [contracts] . . . was a section that gave the Dealership the ability to prevent [her] from being able to sue in court if [she] had a problem." Gillespie was not told that there was an arbitration clause on the back of the contract, she was not asked whether she was willing to arbitrate disputes, she did not see the arbitration clause before she signed the documents, and she was not given the option of signing a contract without an arbitration clause. Gillespie stated that she had no reason to think an arbitration clause was part of purchasing a car, and that had she been aware of the nature and scope of the arbitration clause in the contract, she would not have agreed to that provision in order to purchase a car. Gillespie further stated that she did not receive a copy of any proposed rules for arbitration.

Gillespie's counsel stated in a declaration that he had previously handled a case that went to arbitration at JAMS. The consumer received a "$0 award and invoked the arbitration clause's 'new arbitration' provision. The bill to conduct the one-day, three-person arbitration (which ended up not proceeding because the case settled) was $22,050," which included arbitrator fees, a case management fee, and retainers for the three arbitrators.

**D. *Reply in Support of the Petition to Compel Arbitration***

In their reply brief, defendants contended that procedural unconscionability was "minimal" with respect to the arbitration clause, and that Gillespie could not establish substantive unconscionability. Defendants also argued that the class action waiver was not unconscionable because the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.) preempted the CLRA in this regard.

**E. *The Trial Court's Order***

A hearing was held on defendants' petition to compel arbitration. Subsequently, on February 25, 2013, the trial court filed an order denying the petition. The court determined that, "even if the class action waiver is unenforceable under the CLRA's antiwaiver provision, . . . that state law provision is preempted by the FAA because it disfavors arbitration."

Regarding unconscionability of the arbitration clause, the trial court determined that "the record support[ed] a moderate showing of procedural unconscionability." The court explained that the arbitration clause was on the back of a "densely-worded" contract, the clause was not called to Gillespie's attention, and during each signing Gillespie was presented with a stack of pre-printed forms and told to sign or initial them without an adequate opportunity to read them in full. Further, although there was a four-day interval between the signing of the two contracts, Gillespie "had already entered into the first [contract] as of October 23, 2010 in a process she describes as rushed and

lacking the opportunity to fully read the documents." The court also observed that Gillespie was not provided with a copy of the arbitration rules.

Regarding substantive unconscionability, the trial court determined that the provisions allowing for a second arbitration if the first resulted in an injunction or an award in excess of $100,000, requiring the party seeking the second arbitration to pay for the arbitration costs subject to later apportionment, and exempting from arbitration self-help remedies such as repossession, unfairly benefitted the dealership. The court concluded that the arbitration clause was "permeated with unconscionability" and declined to enforce it.

## III. DISCUSSION

On appeal, defendants contend that the trial court erred in denying their petition to compel arbitration. They argue that the arbitration clause has "minimal" procedural unconscionability, that it is not substantively unconscionable, and that it is therefore enforceable. Defendants also contend that the class action waiver in the arbitration clause is enforceable.

Gillespie contends that the arbitration clause is both procedurally and substantively unconscionable, and that the entire arbitration clause is unenforceable. She also argues that the class action waiver in the arbitration clause violates California law and, pursuant to a "poison pill" provision in the arbitration clause, the entire arbitration clause is unenforceable.

We first address whether the class waiver is enforceable before determining whether the arbitration clause is unconscionable.

### A. *Class Waiver*

The parties' arbitration clause provides the following with respect to the car buyer's waiver of the right to bring a class claim: "If a dispute is arbitrated, you will give up your right to participate as a class representative or class member on any class claim you may have against us including any right to class arbitration or any consolidation of

individual arbitrations. [¶] . . . [¶] . . . Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. . . . [¶] . . . [¶] . . . If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the remainder of this Arbitration Clause shall be unenforceable." (Capitalization omitted.)

Gillespie's complaint includes CLRA claims alleged on behalf of a class. The CLRA provides that a consumer is entitled to bring a class action to obtain relief. (Civ. Code, § 1781, subd. (a).) The CLRA further provides that any waiver of the provisions of the CLRA is contrary to public policy, unenforceable, and void. (*Id.*, § 1751.) "Thus, class actions are among the provisions of the CLRA that may not be waived." (*Sanchez, supra,* 61 Cal.4th at p. 923.)

Gillespie contends that the class waiver in the parties' arbitration clause is illegal and unenforceable under the CLRA, and that the "poison pill" provision in the arbitration clause applies and renders the remainder of the arbitration clause unenforceable. She further contends that the FAA does not preempt the CLRA's prohibition on class action waivers, and that even if preemption applies, the parties chose to have California law apply to their contract. Defendants contend that the CLRA provision prohibiting a class waiver is preempted by federal law, and that the class waiver in the arbitration clause is enforceable.

In *Sanchez,* the California Supreme Court addressed the enforceability of an apparently identical class waiver in the arbitration clause of a vehicle sales contract. As in this case, the plaintiff in *Sanchez* relied on the anti-waiver provision of the CLRA to argue that the class waiver was unenforceable. (See *Sanchez, supra,* 61 Cal.4th at p. 923.)

The California Supreme Court disagreed that the class waiver was unenforceable. The court explained that in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333

(*Concepcion*), the United States Supreme Court "held that the FAA requires enforcement of class waivers in consumer arbitration agreements and preempts state law to the contrary." (*Sanchez, supra*, 61 Cal.4th at p. 909.) Based on *Concepcion*, the California Supreme Court determined that "the CLRA's anti-waiver provision is preempted insofar as it bars class waivers in arbitration agreements covered by the FAA." (*Sanchez, supra*, at p. 924.) The California Supreme Court accordingly held that "*Concepcion* requires enforcement of the class waiver" in the case before it. (*Sanchez, supra*, at p. 907.)

In this case, in an attempt to avoid preemption, Gillespie argues that under the parties' contract, they agreed to apply California law. According to Gillespie, "this means the parties exercised their right to contractually agree California law applies to the interpretation of the contract, even if it would have otherwise been preempted by the FAA."

We are not persuaded by Gillespie's argument. The parties' contract provides generally that "[f]ederal law and California law apply to this contract." To the extent there is a conflict, the supremacy clause of the United States Constitution mandates that federal law preempts state law. (*Washington Mutual Bank v. Superior Court* (2002) 95 Cal.App.4th 606, 612.) We further observe that the arbitration clause specifically states that "[a]ny arbitration under this Arbitration Clause shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et. seq.) and not by any state law concerning arbitration." To the extent this provision governs the interpretation of the class waiver provision at issue, the FAA and preemption are applicable.

Gillespie also argues that language in the arbitration agreement—"If a waiver of class action rights is deemed or found to be unenforceable *for any reason* . . . , the remainder of this Arbitration Clause shall be unenforceable"—means that the class action waiver is unenforceable because the CLRA prohibits class waivers. (Italics added.) The California Supreme Court considered identical language in the arbitration agreement in *Sanchez* and rejected this construction of the agreement. The court determined that this

language "is most reasonably interpreted to permit the parties to choose class litigation over class arbitration in the event that the class waiver turns out to be legally invalid. Because we conclude in light of *Concepcion* that the FAA preempts . . . invalidation of the class waiver . . . , the agreement's poison pill provision is inoperable." (*Sanchez, supra,* 61 Cal.4th at p. 924.)

Accordingly, the class waiver in the parties' arbitration clause is enforceable. (*Sanchez, supra,* 61 Cal.4th at pp. 906, 907, 923-924) Consequently, the "poison pill" provision, which states that if the class waiver "is . . . found to be unenforceable" then "the remainder of this Arbitration Clause shall be unenforceable," is not triggered. We next consider whether the parties' arbitration clause is unconscionable as to certain provisions.

**B. *Unconscionability***

**1. Legal Principles Regarding Unconscionability**

Under the FAA and the California Arbitration Act (CAA; Code Civ. Proc., § 1280 et seq.), an arbitration agreement may be found unenforceable based on grounds applicable to contracts generally, such as unconscionability. (*Sanchez, supra,* 61 Cal.4th at p. 906; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114; Civ. Code § 1670.5, subd. (a).) "Because unconscionability is a contract defense, the party asserting the defense bears the burden of proof. [Citation.]" (*Sanchez, supra,* at p. 911.)

" ' "[T]he doctrine of unconscionability has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results." ' [Citation.]" (*Sanchez, supra,* 61 Cal.4th at p. 910.) " ' "Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form." ' [Citation.]" (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 247.) "The procedural element

of an unconscionable contract generally takes the form of a contract of adhesion, ' "which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." ' [Citation.]" (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071 (*Little*).)

" ' "The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability." [Citation.] But they need not be present in the same degree. . . . [T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.' [Citation.]" (*Sanchez*, *supra*, 61 Cal.4th at p. 910, italics omitted.)

" 'The unconscionability doctrine ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as " ' "overly harsh" ' " [citation], " 'unduly oppressive' " [citation], " 'so one-sided as to "shock the conscience" ' " [citation], or "unfairly one-sided" [citation]. All of these formulations point to the central idea that unconscionability doctrine is concerned not with "a simple old-fashioned bad bargain" [citation], but with terms that are "unreasonably favorable to the more powerful party" [citation].' " (*Sanchez*, *supra*, 61 Cal.4th at pp. 910-911.)

The unconscionability analysis is "highly dependent on context" and "often requires inquiry into the 'commercial setting, purpose, and effect' of the contract or contract provision. [Citations.]" (*Sanchez*, *supra*, 61 Cal.4th at pp. 911-912.) Indeed, " ' "a contract can provide a 'margin of safety' that provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need without being unconscionable." ' [Citations.]" (*Id.* at p. 912.)

"On appeal from the denial of a motion to compel arbitration, '[u]nconscionability findings are reviewed de novo if they are based on declarations that raise "no meaningful factual disputes." [Citation.] However, where an unconscionability determination "is

based upon the trial court's resolution of conflicts in the evidence, or on the factual inferences which may be drawn therefrom, we consider the evidence in the light most favorable to the court's determination and review those aspects of the determination for substantial evidence." [Citation.]' " (*Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816, 820-821.)

**2. Procedural Unconscionability**

Defendants concede that the parties' contract is a contract of adhesion but contend that there is "minimal procedural unconscionability arising solely out of its status as a contract of adhesion." Defendants argue that Gillespie cannot establish a greater degree of procedural unconscionability because she cannot demonstrate surprise or oppression. Defendants contend that Gillespie possessed the first contract for four days before she signed the second contract and thus she could have read the terms "at her leisure for four days," that there is no evidence she was prevented from reading either contract, and that she is bound by the terms of the arbitration clause even if she failed to read it before signing the contract. Defendants further contend that the formatting on the back of the contract sufficiently highlights the arbitration clause, and that the front of the contract contains an acknowledgment that the buyer has read the arbitration clause on the back. Defendants also argue that a preprinted contract is necessary to ensure that the terms comply with the law and are available in various languages as required by law.

Gillespie contends that there is a "strong showing" of procedural unconscionability. She argues that the parties' contract was a contract of adhesion. She also argues that the arbitration clause is hidden on the back of a dense, preprinted form. According to Gillespie, the dealership presented her with sale documents and told her where to sign. She was not given an opportunity to read all the documents in full, she was not given any opportunity to negotiate any of the preprinted terms in the contract, and she was not informed that the contract contained an arbitration clause. Gillespie also

contends that defendants' failure to provide a copy of the proposed arbitration rules supports a finding of procedural unconscionability.

In *Sanchez, supra,* 61 Cal.4th 899, the plaintiff car buyer was presented with an arbitration clause under circumstances similar to this case. The defendant dealership presented the plaintiff with a stack of pre-printed form documents, the documents were offered on a take-it-or-leave-it-basis, the plaintiff was told where to sign, the plaintiff was not asked if he was willing to arbitrate disputes, and the plaintiff did not see the arbitration clause on the back of the purchase contract before he signed the documents. (*Id.* at p. 909.) Further, the defendant dealership, as in this case, did not dispute that the contract was adhesive. (*Id*. at p. 913.)

The California Supreme Court observed that, "although [the defendant dealership] argues that 90 percent of the standardized contract was mandated by statute, it does not contend that the arbitration agreement was so mandated." (*Sanchez*, *supra*, 61 Cal.4th at p. 914.) The court also explained that in the context of consumer contracts, it had "never required, as a prerequisite to finding procedural unconscionability, that the complaining party show it tried to negotiate standardized contract provisions. [Citations.]" (*Ibid*.) However, the defendant dealership "was under no obligation to highlight the arbitration clause of its contract, nor was it required to specifically call that clause to [the plaintiff car buyer's] attention. Any state law imposing such an obligation would be preempted by the FAA. [Citations.]" (*Id.* at pp. 914-915) The court further explained that, "even when a customer is assured it is not necessary to read a standard form contract with an arbitration clause, 'it is generally unreasonable, in reliance on such assurances, to neglect to read a written agreement before signing it.' [Citation.]" (*Id.* at p. 915.) The court ultimately determined that "the adhesive nature of the contract [was] sufficient to establish some degree of procedural unconscionability." (*Ibid.*)

In this case, the record reflects that the contract containing the arbitration clause was adhesive, as it was drafted and imposed by defendants, and Gillespie had " ' "only

the opportunity to adhere to the contract or reject it." ' " (*Little, supra,* 29 Cal.4th at p. 1071.) Based on *Sanchez*, the record in this case, and defendants' concession that the parties' contract is one of adhesion, we conclude that there is "some degree of procedural unconscionability" regarding the parties' contract. (*Sanchez, supra,* 61 Cal.4th at p. 915.)

The fact that Gillespie was not provided with a copy of any arbitration rules does not significantly alter our analysis. Although the arbitration clause identified the American Arbitration Association as a possible arbitration provider, the arbitration clause also left open the possibility that the parties would select a different, mutually agreeable arbitration provider in the future.

**3. Substantive Unconscionability**

The trial court determined that the arbitration clause was substantively unconscionable based on the following provisions: (1) the exception to the rule that the arbitrator's award is final and allowing a second arbitration if the first award is "$0," exceeds $100,000, or includes injunctive relief, (2) the requirement that the appealing party pay the costs of the second arbitration subject to possible apportionment later, and (3) the exemption of self-help remedies such as repossession from the arbitration clause.

On appeal, defendants contend that the arbitration clause is not substantively unconscionable, while Gillespie contends that the arbitration clause is substantively unconscionable with respect to the provisions identified by the trial court plus several other provisions. As we will explain, based on *Sanchez* we determine that none of the provisions identified by the trial court are substantively unconscionable, and we further determine that none of the other provisions identified by Gillespie are substantively unconscionable.

**a. *Second arbitration after certain types of awards***

The arbitration clause provides that the arbitrator's award "shall be final and binding on all parties, except that in the event the arbitrator's award for a party is $0 or against a party is in excess of $100,000, or includes an award of injunctive relief against

a party, that party may request a new arbitration under the rules of the arbitration organization by a three-arbitrator panel."

Gillespie argues that although the provision appears neutral, it actually benefits the dealership. According to Gillespie, the dealership is more likely than her to suffer an adverse award in excess of $100,000, as she is obligated under the contract to make monthly payments for a car totaling significantly less than that amount. In comparison, the dealership faces substantial damages, including punitive damages, for the consumer claims. Further, the car buyer, not the dealership, would typically obtain injunctive relief. Gillespie argues that allowing a second arbitration under such circumstances denies the car buyer the benefits of arbitration.

Defendants contend that the provisions allowing for a second arbitration if the award is zero or exceeds $100,000 "balance each other out" and allow each party to seek a second arbitration after "an outlier award." Specifically, defendants argue that the plaintiff buyer is more likely to seek a second arbitration after an award of zero, while the defendant dealership is more likely to seek a second arbitration after an award exceeding $100,000, as that amount is "far greater than the value of most cars today." An award falling between those amounts is subject to finality, thus preserving "the economical and speedy nature of arbitration." Regarding injunctive relief, defendants contends, among other arguments, that because an injunction may have a substantial and continuing effect on a business, it is appropriate to preserve the right to a second arbitration after such an award.

In *Sanchez*, the California Supreme Court considered whether an identical arbitration provision, which the court referred to as an appeal provision, was substantively unconscionable, and the court concluded that it was not. In particular, regarding the ability to appeal depending on the dollar amount of the award, the court explained as follows: "[T]he appeal threshold provision does not, on its face, obviously favor the drafting party. Assuming, as the parties do, the likely scenario of the buyer as

the plaintiff and the seller as the defendant, the unavailability of an appeal from an award that is greater than $0 but not greater than $100,000 means that the buyer may not appeal from a non-$0 award that he or she believes to be too small, nor may the seller appeal from a quite substantial award (up to $100,000) that it believes to be too big. It may be reasonable to assume that the ability to appeal a $0 award will favor the buyer, while the ability to appeal a $100,000 or greater award will favor the seller. But nothing in the record indicates that the latter provision is substantially more likely to be invoked than the former. We cannot say that the risks imposed on the parties are one-sided, much less unreasonably so." (*Sanchez*, *supra*, 61 Cal.4th at pp. 916-917.)

As in *Sanchez*, nothing in the record reflects that the provision providing for a second arbitration after an award of $100,000 or greater "is substantially more likely to be invoked" by the seller than the provision for a second arbitration after an award of $0 by the buyer. (*Sanchez*, *supra*, 61 Cal.4th at p. 917.) We therefore "cannot say that the risks imposed on the parties are one-sided, much less unreasonably so." (*Ibid.*)

Regarding the ability to seek a second arbitration after an award of injunctive relief, the California Supreme Court found "significant [the defendant dealership's] concern that the scope of an injunction can extend well beyond the transaction at issue and can compel a car seller to change its business practices. Because of the broad impact that injunctive relief may have on the car seller's business, the additional arbitral review when such relief is granted furnishes ' "a 'margin of safety' that provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need." ' [Citation.] The potentially far-reaching nature of an injunctive relief remedy, which [the plaintiff car buyer] does not dispute, is sufficiently apparent here to justify the extra protection of additional arbitral review." (*Sanchez*, *supra*, 61 Cal.4th at p. 917.)

Based on *Sanchez*, we determine that the provision providing for a second arbitration if the first award is zero, exceeds $100,000, or includes injunctive relief is not substantively unconscionable.

**b. *Costs for second arbitration***

The arbitration clause also provides that the "appealing party" seeking a new arbitration before a three-arbitrator panel "shall be responsible for the filing fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs." Under this provision, the appealing party is responsible for advancing the filing fee and costs of arbitration for *both* parties, including the three arbitrators' fees.

Gillespie's counsel stated in a declaration opposing the petition to compel arbitration that he had handled three cases that went to arbitration in 2007 and 2008 involving violations of the CLRA and the Automobile Sales Finance Act. The arbitrators' hourly fees were between $400 and $600 per hour. The arbitration for one of the cases was conducted by JAMS and resulted in a zero award for the consumer. The consumer sought a new arbitration under the arbitration clause. According to counsel, "[t]he bill to conduct the one-day, three-person arbitration (which ended up not proceeding because the case settled) was $22,050, reflecting $13,650 in arbitrator fees, $800 for a Case Management Fee, and $7,600 in retainers for the three arbitrators."

Gillespie argues that the cost provision "allows a dealership with deep pockets to appeal while effectively discouraging or possibly outright preventing a more cash-strapped consumer from doing so." Gillespie states that although a consumer may seek a waiver of arbitration fees and costs under Code of Civil Procedure section 1284.3, subdivision (b), "a consumer need not be indigent to feel crippled by the high costs of arbitration." She further contends that the CLRA and CAA limit the arbitration expenses that a consumer may be required to pay, but the parties' arbitration agreement nevertheless requires the appealing party to advance the arbitral expenses for both parties, subject to reallocation at the end of the proceeding. Gillespie contends that

reapportionment at the end of the proceeding is inadequate for consumers who cannot afford to initiate the appeal process. Moreover, the arbitration clause does not specify the amount that must be paid in advance, creating the possibility that a car buyer may have to advance "unaffordable expenses without any effective avenue of relief," which may discourage a buyer from pursuing a second arbitration.

Defendants contend that the cost provision is fair because it applies to any party that appeals, and is "no different" than the judicial forum "where the appealing party must advance costs." Defendants further argue that by requiring significant upfront costs, the provision discourages disappointed parties from appealing, which promotes finality. It also limits the financial impact of a second arbitration on the nonappealing party. Moreover, it creates a disincentive to a disgruntled party who might appeal in order to force the other party to settle solely to avoid incurring additional fees and costs. Defendants further contend that an indigent car buyer may seek a waiver of fees and costs under Code of Civil Procedure section 1284.3, that the arbitration clause gives the arbitration panel discretion to grant a waiver of costs in the interest of fairness, and that an arbitrator has the authority to waive or reallocate costs of appeal to protect an indigent buyer. Defendants also assert that in most cases, buyers enter into contingency fee agreements under which counsel, and not the buyer, would pay costs. Lastly, defendants assert that the dealership cannot afford to appeal every adverse arbitration award, so the cost provision "favor[s] the buyer by providing a better chance for finality of the initial arbitration award."

In *Sanchez*, the California Supreme Court addressed whether an identical arbitration costs provision was unconscionable and determined that the plaintiff car buyer failed to make a sufficient showing. The court explained that "the arbitration agreement did not have to provide for an appeal" or second arbitration. (*Sanchez*, *supra*, 61 Cal.4th at p. 920.) "But having done so, the agreement may not structure the appeal process so that it unreasonably favors one party, just as the agreement may not authorize only one

party and not the other to take an appeal. [Citation.] . . . [A] requirement that a consumer front any appellate filing fees or other arbitration costs—recall that an appeal here requires not one but three arbitrators—has the potential to deter the consumer from using the appeal process. But given the Legislature's approach to the affordability of consumer arbitration, the provision cannot be held unconscionable absent a showing that appellate fees and costs *in fact* would be unaffordable or would have a substantial deterrent effect in [the plaintiff buyer's] case. [Citation.]" (*Id.* at p. 920, italics added.) In this regard, the court observed that the plaintiff did not claim, nor was there evidence in the record to suggest that "the cost of appellate arbitration filing fees were unaffordable for him, such that it would thwart his ability to take an appeal in the limited circumstances where such appeal is available." (*Id.* at p. 921.) The court concluded, based on the record before it, that "the arbitral appeal fee provision [was] not unconscionable." (*Ibid.*)

In this case, although Gillespie's counsel provided a declaration describing the cost of a second arbitration with three arbitrators, Gillespie does not appear to claim, and no evidence in the record suggests, that the cost was "unaffordable for [her], such that it would thwart [her] ability to take an appeal in the limited circumstances where such appeal is available." (*Sanchez*, *supra*, 61 Cal.4th at p. 921.) We therefore conclude on the record before us that the provision providing for a second arbitration is not unconscionable. (*Ibid.*)

**c. *Self-help remedies and small claims actions***

The arbitration clause allows the parties to "retain any rights to self-help remedies, such as repossession" and the "right to seek remedies in small claims court for disputes or claims within that court's jurisdiction." Gillespie argues that these exclusions from arbitration apply to claims a dealership is likely to bring.

The California Supreme Court in *Sanchez* concluded that an identical arbitration provision was not substantively unconscionable. The court explained as follows: "[W]e

see nothing unconscionable about exempting the self-help remedy of repossession from arbitration. First, although this remedy is favorable to the drafting party, the contract provision that preserves the ability of the parties to go to small claims court likely favors the car buyer. Second, arbitration is intended as an alternative to litigation, and the unconscionability of an arbitration agreement is viewed in the context of the rights and remedies that otherwise would have been available to the parties. [Citation.] Self-help remedies are, by definition, sought outside of litigation, and they are expressly authorized by statute. Commercial Code section 9609, subdivisions (a)(1) and (b)(2) authorize a secured creditor '[a]fter default' to '[t]ake possession of the collateral' '[w]ithout judicial process, if it proceeds without breach of the peace.' Civil Code sections 2983.2 and 2983.3 set forth the requirements for post-repossession notice and opportunity to cure default in the case of automobile loans. Moreover, it is undisputed that the remedy of repossession of collateral is an integral part of the business of selling automobiles on credit and fulfills a ' "legitimate commercial need." ' [Citation.] We thus conclude that the exclusion of such a remedy from an arbitration agreement, while favorable to [the defendant dealership], is not unconscionable." (*Sanchez, supra*, 61 Cal.4th at p. 922.)

Based on *Sanchez*, we conclude that the provision exempting repossession and other self-help remedies from arbitration is not substantively unconscionable.

**d. *Other provisions***

**i. costs for initial arbitration**

Gillespie also challenges the following cost provision concerning the initial arbitration: "We will *advance your* filing, administration, service or case management fee *and your* arbitrator or hearing fee all *up to a maximum of $2,500*, which may be *reimbursed* by decision of the arbitrator at the arbitrator's discretion." (Italics added.)

Gillespie argues that this provision "makes the consumer front all costs above $2,500," and that such costs may be a significant amount. Gillespie fails, however, to

provide any evidence establishing that the $2,500 advance by the car dealership would not cover a consumer's portion of arbitration fees.

Gillespie further argues that a consumer is potentially responsible for all costs of arbitration under this provision. She contends that this is illegal under Code of Civil Procedure section 1284.3, subdivision (a), which provides that a consumer may not be required to pay "the fees and costs incurred by *an opposing party* if the consumer does not prevail in the arbitration . . . ." (Italics added.) Assuming, without deciding, that section 1284.3, subdivision (a), which is part of the CAA, applies to the conduct of the parties' arbitration, the parties' arbitration clause does *not* require the car buyer to pay the dealership's arbitration fees or costs. Rather, the cost provision provides that the car dealership will "advance" the car buyer's share of arbitration fees, and that the car buyer may be required to "reimburse" that amount at the arbitrator's discretion. Thus, the car buyer is only responsible for the buyer's *own* share of the arbitration fees.

**ii. class action waiver**

Gillespie contends that the class action waiver is one-sided, that defendants do not give up anything in return, and that the waiver operates as an illegal exculpatory clause in violation of Civil Code section 1668.

Gillespie's arguments are similar to those addressed in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (*Discover Bank*), a case which was ultimately invalidated by the United States Supreme Court in *Concepcion*. In *Discover Bank*, the defendant bank sought to compel arbitration of the plaintiff's contract and statutory claims on an individual basis and to dismiss class claims pursuant to a class action waiver in the parties' arbitration agreement. (*Id.* at p. 154.) The California Supreme Court explained that "some class action waivers in consumer contracts are unconscionable under California law." (*Id.* at p. 160.) Among other reasons, the court stated that class action waivers "are indisputably one-sided" because " 'credit card companies typically do not sue their customers in class action lawsuits.' " (*Id.* at p. 161.) The California Supreme

Court ultimately determined that "when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' (Civ. Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced." (*Id.* at pp. 162-163.) The California Supreme Court further held that "the FAA does not prohibit a California court from refusing to enforce a class action waiver that is unconscionable." (*Id.* at p. 173.)

However, in *Concepcion* the United States Supreme Court held that the FAA "preempts California's unconscionability rule prohibiting class waivers in consumer arbitration agreements," thereby abrogating *Discover Bank*. (*Sanchez*, *supra*, 61 Cal.4th at p. 906; see *id.* at p. 923.) According to *Concepcion*, "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." (*Concepcion*, *supra*, 563 U.S. at p. 344.) In particular, "class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." (*Id.* at p. 348.) Also, "class arbitration greatly increases risks to defendants" and "is poorly suited to the higher stakes of class litigation" because of the lack of judicial review, "thus rendering arbitration unattractive" to defendants. (*Id*. at pp. 350, 351, fn. 8.) The California Supreme Court in *Sanchez*, addressing an identical class waiver as the one in the instant case, concluded that "[t]o find the class waiver here unconscionable would run afoul of *Concepcion*." (*Sanchez*,

*supra*, at p. 923.) *Concepcion* and *Sanchez* thus preclude the particular unconscionability arguments raised by Gillespie concerning the class waiver.

**iii. attorney's fees**

The CLRA provides that a prevailing defendant may be awarded reasonable attorney's fees upon a finding that the plaintiff did not prosecute the action in "good faith." (Civ. Code, § 1780, subd. (e).) Gillespie contends that she "loses" this "protection" under the parties' arbitration clause and that she is "at risk for [defendants'] fees even if she loses a good faith CLRA claim."

We are not persuaded by Gillespie's argument. The arbitration clause provides that "[e]ach party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under *applicable law*." (Italics added.) Thus, defendants may recover their attorney's fees only to the extent permitted by "applicable law," which would include the CLRA's restrictions on attorney's fees for prevailing defendants.

**iv. National Arbitration Forum**

The arbitration clause allows the car buyer to select one of the following organizations as the arbitration provider: the National Arbitration Forum, the American Arbitration Association, or any other organization subject to the car dealership's approval. Gillespie contends that the National Arbitration Forum stopped arbitrating consumer matters prior to her signing the contract. She contends that the car dealership's continued inclusion of the National Arbitration Forum in the arbitration clause, "knowing [it was] not a real option, means [the car dealership] willfully gave consumers the false appearance of a choice in arbitral forums, which is even more misleading and unconscionable."

Gillespie fails to persuasively articulate why the continued inclusion of the National Arbitration Forum, whether willful or inadvertent, causes the provision concerning the selection of an arbitration organization to be unfairly one-sided, which is the basis for a finding of substantive unconscionability. (*Sanchez*, *supra*, 61 Cal.4th at

pp. 910-911.) The arbitration clause allows the car buyer to select the American Arbitration Association, or any other arbitration organization subject to the car dealership's approval. Gillespie fails to demonstrate, for example, that the American Arbitration Association is a more favorable forum for car dealerships than buyers.

**v. approval of arbitration provider**

Gillespie next contends that defendants have "veto power" over the selection of an arbitrator. The arbitration clause states: "You may choose one of the following arbitration organizations and its applicable rules: the National Arbitration Forum . . . (www.arb-forum.com), the American Arbitration Association . . . (www.adr.org), or any other organization that you may choose subject to our approval." The selection provision essentially requires that the parties mutually agree on an arbitration provider. There is no evidence in the record that defendants have unreasonably withheld approval of an arbitration provider that was selected by a car buyer.

Gillespie also contends that the car dealership "will never have to . . . choose where to file its arbitral dispute because it excluded its claims from arbitration." Contrary to Gillespie's suggestion, the arbitration clause generally includes any claims the dealership might have against the car buyer. The arbitration clause provides that "[a]ny claim or dispute . . . between [the car buyer] and [the car dealership] . . . which arises out of or relates to [the car buyer's] credit application, purchase or condition of [the] vehicle, this contract or any resulting transaction or relationship . . . shall, at [the car buyer's] or [the car dealership's] election, be resolved by neutral, binding arbitration and not by a court action."

**vi. mandatory arbitration**

Lastly, Gillespie contends that arbitration is not mandatory under the arbitration clause except when defendants " 'choose' arbitration," which only occurs when a consumer brings a class action. Gillespie's argument is not persuasive. The arbitration clause provides that the car buyer or the dealership "may choose to have any dispute

between [them] decided by arbitration and not in court or by jury trial." (Capitalization omitted.) The arbitration clause further states, as quoted above, that any claim between the parties arising out of the purchase of the car "shall, at [the car buyer's] or [the car dealership's] election, be resolved by neutral, binding arbitration and not by a court action." Arbitration is thus mandatory to the extent the car buyer *or* the car dealership elects to proceed in arbitration.

**C. *Conclusion***

We have determined that the class action waiver in the parties' arbitration agreement is enforceable, and that the agreement is not substantively unconscionable. Because both procedural unconscionability and substantive unconscionability must be shown in order to invalidate an arbitration agreement, Gillespie has not established a valid defense to the enforceability of the parties' arbitration agreement. (*Sanchez*, *supra*, 61 Cal.4th at pp. 910, 911.) We therefore conclude that the trial court erred in denying defendant's petition to compel arbitration.

## IV. DISPOSITION

The February 25, 2013 order denying the petition to compel arbitration is reversed. The trial court is directed to enter an order granting the petition. The parties are to bear their own costs on appeal.

_____
BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

_____
MIHARA, J.

_____
GROVER, J.

***Gillespie v. Svale Del Grande***
**H039428**